

**Stark Electric, Inc. and International Brotherhood of Electrical Workers, Local 317, AFL-CIO. Case 9-CA-33816**

January 29, 1999

**DECISION AND ORDER**

BY CHAIRMAN TRUESDALE AND MEMBERS FOX  
AND HURTGEN

On March 11, 1998, Administrative Law Judge Martin J. Linsky issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Stark Electric, Inc., Huntington, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

*Eric V. Oliver, Esq.*, for the General Counsel.

*James W. St. Clair, Esq.*, of Huntington, West Virginia, for the Respondent.

**DECISION**

**STATEMENT OF THE CASE**

MARTIN J. LINSKY, Administrative Law Judge. On April 17, 1996, IBEW Local 317 (the Union) filed a charge against Stark Electric, Inc. (Respondent).

On March 27, 1997, the National Labor Relations Board, by the Regional Director for Region 9, issued a complaint which alleges that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), when it failed and refused to hire five applicants for employment because of their union affiliation.

Respondent filed an answer in which it denied that it violated the Act in any way.

<sup>1</sup> As found by the judge, the Respondent demonstrated animus towards the five union applicants by informing applicant Nicholas, during his employment interview that, if hired, Nicholas "couldn't talk union." The Respondent's animus is further demonstrated by various statements it made to its employees in May 1996, which statements the Board found unlawful in *Stark Electric, Inc. (Stark I)*, 324 NLRB 1207 (1997), enf. per curiam in relevant part *NLRB v. Stark Electric*, No. 98-1403 (4th Cir. 1998). In *Stark I*, the Respondent informed an applicant that the five discriminatees here had sought work, and unlawfully asked the applicant, "you're not one of those Union bastards?" The Respondent also was found to have unlawfully disparaged the Union and impliedly threatened union supporters when it informed employees that: (1) Nicholas was an "SOB Union organizer," (2) it would run "Union SOBs" off the job, and (3) union members were lazy, that the Union protected the lazy, and that it would not have union members working for it. Finally, the Respondent demonstrated its animus by asking a laid-off employee, who had inquired about his chances for rehire, "Aren't you one of the ones who joined the Union?"

A hearing was held before me on September 23, 1997, in Huntington, West Virginia.

On the entire record in this case, to include posthearing briefs submitted by the General Counsel and Respondent, and on my observation of the demeanor of the witnesses, I make the following

**FINDINGS OF FACT**

**I. JURISDICTION**

Respondent, a West Virginia corporation with an office and place of business in Huntington, West Virginia, has been engaged as an electrical contractor in the construction industry.

Respondent admits, and I find, that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

**II. THE LABOR ORGANIZATION INVOLVED**

Respondent admits, and I find, that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

**III. THE ALLEGED UNFAIR LABOR PRACTICES**

On March 28, 1996, five union electricians went to Respondent's office in Huntington, West Virginia, to apply for work.

One of the five, Sherman Nicholas, is a full-time paid union organizer for the Charging Party, IBEW Local 317, which Local is located in Huntington. The other four applicants were out of work union electricians. Three of the four, John Lambert, Mike Maple, and Danny Adams were members of IBEW Local 575 in Portsmouth, Ohio, which is some 45 minutes by car from Huntington. The fifth applicant, Majorie Mounts, was a member of IBEW Local 683 located in Columbus, Ohio, but she lived in the Portsmouth, Ohio area.

As the five job applicants entered Respondent's office Nicholas produced a camcorder. Karen Stark, president of Respondent, who was present in the office told Nicholas to put down the camcorder. He did. The applicants said they wanted to apply for work, were given applications by Karen Stark which they filled out and handed back to Karen Stark. They then left Respondent's office. The applicants were wearing union jackets and hats and it was obvious they were union electricians and this is not contested by Respondent.

Karen Stark testified that the application form given to the five applicants was incomplete and she send copies of the applications filled out by four of the five applicants back to the four applicants by mail with instructions to fill in a new section on the application form which stated "wages expected" and a blank space for the applicant to put in what wages they expected if hired by Respondent. I do not find that asking the applicants what wages they expected was a ruse or devise to discriminate but rather this "wages expected" section was normally on Respondent's application but had been inadvertently omitted from an application Karen Stark had typed up when she ran out of applications and she reproduced this application with the "wages expected" section inadvertently left blank and gave these incomplete application forms to these five applicants. Sherman Nicholas was called into Respondent's office on March 29, 1996, and filled in the "wages expected" section at that time.

With respect to wages expected Sherman Nicholas wrote "shop rate," John Lambert wrote "Neg hrs 13-15 hr," Mike Maple wrote "Journeyman wireman wage expected," Danny

Adams wrote "12.50/hr," and Majorie Mounts wrote "State of Ohio Prevailing Wage." State of Ohio prevailing wage was about \$27 per hour. Needless to say "wages expected" is different from "wages required" and is different from an applicant informing a prospective employer that they will work for no less than a certain hourly wage.

All five applicants, all of whom testified, were very experienced electricians and all five identified themselves as journeymen electricians on their applications. They also submitted resumes. All five had worked as electricians for many years. The applications they submitted were preprinted with the following language, i.e., "all applications keep on file for 30 days and then discarded [sic]."

None of the five applicants was hired and only one, Sherman Nicholas, was even interviewed.

Hiring for Respondent was done by Bill Stark who has the title of consultant and is the father of Respondent's President Karen Stark or by Respondent's estimator who no longer works for Respondent.

Although none of the 5 union applicants were hired or offered employment Respondent did hire a number of other employees, i.e., 13 in all between April 1 and June 11, 1996:

	START WORK	NAME
1.	4-01-96	Michael Mayo
2.	4-08-96	Michael Price
3.	4-10-96	Tim Stidham
4.	4-18-96	Kyle Jackson
5.	4-22-96	Joseph Gregory
6.	4-22-96	Joel Stidham
7.	4-23-96	Joseph Rose
8.	5-03-96	Dwayne Pennington
9.	5-04-96	Eric Wilburn
10.	5-10-96	John T. Sharkey
11.	5-23-96	Jim Shope
12.	5-29-96	Kevin Scaggs
13.	6-11-96	Terry Hundley

The five discriminatees had at least the qualifications of the persons hired. A legitimate question is why weren't these five discriminatees offered employment.

One of the discriminatees and only one, Sherman Nicholas, was interviewed by Respondent. In the interview which took place on March 29, 1996, the day after the five alleged discriminatees applied for work Nicholas filled in the "wages expected" section by writing in "shop rate" and explained to Bill Stark that by "shop rate" he meant get what everyone else got paid. Stark told Nicholas that Respondent could have work in the next week or so and if hired Nicholas couldn't talk union. Stark said starting pay would be \$10 per hour and Nicholas said fine. Nicholas was never offered a job.

Nicholas had 20 years experience as an electrician, 4 as an apprentice and 16 as a journeyman and was an instructor at the Joint Apprentice Training Course (JATC) instructing apprentices in how to become journeymen electricians.

Although Nicholas, with 20 years' experience, was *not* hired Michael Price was hired on April 8, 1996, Dwayne Pennington was hired on May 3, 1996, and Eric Wilburn was hired on May 4, 1996. Price had very limited experience, Pennington was in the 4th year of his apprenticeship, and Wilburn had 4 or 5 years' experience.

Majorie Mounts has been a journeyman electrician for 5 years and counting her apprenticeship has 9 years' electrical experience. She had been trying without success to get a job with Respondent since October 1995. Her desire was to be hired by Respondent to work at the Ohio Department of Transportation Garage job in Lucasville, Ohio, which Respondent had and which was a prevailing wage job, i.e., union wages would be paid. She was hopeful of a higher-paying job but was never offered the chance to accept one that paid less.

John Lambert had been a electrician for 16 or 17 years and yet was passed over for employment by Respondent.

Mike Maple was a journeyman electrician for 16 years and was also passed over for employment by Respondent.

Danny Adams had 24 years experience as an electrician and, like Sherman Nicholas, was an instructor at a Joint Apprenticeship Training Course (JATC) instructing apprentices in the intricacies of electrical work and yet he was also passed over for employment by Respondent.

All five alleged discriminatees had significant electrical experience and were not hired. Although Sherman Nicholas had a West Virginia electrical license the other four alleged discriminatees did not. However, one could be hired and go to work on permit without a West Virginia electrical license but you needed to get one within 90 days of commencing employment. Bill Stark conceded you could go to work without a license but had to get one. The four were willing to get the license and were qualified to get the license and indeed Respondent has hired electricians who did *not* have a West Virginia electrical license at the time they were hired, e.g., Tim and Joel Stidham, who were hired on April 10 and 22, 1996.

As noted above 13 electricians were hired by Respondent between April 1 and June 11, 1996. Although all five alleged discriminatees were journeymen and were not hired, Michael Price who identified himself on his application as an apprentice was hired.

Although Tim Stidham put "going rate" next to "wages expected" on his application he was hired whereas discriminatee Sherman Nicholas who wrote "shop rate" was not hired.

Respondent claims that it had some prevailing wage jobs but not many and these jobs were reserved for long time employees of Respondent. This was not contested and is not unlawful. But Respondent did have lower-paying jobs for which the five discriminatees in this case were more than qualified and Respondent hired a number of applicants in the April to June 1996 time frame and paid them less than what they wrote in the "wages expected" section of their applications, e.g., Kyle Johnson and Joseph Gregory "expected" \$10 per hour and received \$8 per hour and Joseph Rose "expected" \$12 per hour and received \$8 per hour. Seven of the thirteen applicants hired between April 1 and June 11, 1996, and listed above did *not* submit applications so we can only hazard a guess as to what they would have listed in the "wages expected" section if they had filled out an application. Also, there was no evidence presented as to whether or not any of the seven had West Virginia electrical licenses or not when hired.

Respondent claims it didn't offer jobs to the five alleged discriminatees for a variety of reasons all of which were specious, i.e., they put down in "wages expected" section more than Respondent would pay, some didn't have a West Virginia electrical license, and some lived so far away that Respondent assumed they would not travel that far for a job that paid what Respondent would pay them. All these reasons are specious or

deceptive. For example, at the time Majorie Mounts testified before me in September 1997 she was working at a job that required a 1-1/2 hour commute each way.

The only rational explanation for Respondent's failure and refusal to hire these five alleged discriminatees is the fact that they were members of a union and this is a violation of Section 8(a)(1) and (3) of the Act. See *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995), and *Walz Masonry*, 323 NLRB 1258 (1997).

#### REMEDY

The remedy in this case should include a cease and desist order, the posting of an appropriate notice and an order requiring Respondent to offer employment to and make whole the five discriminatees in the case, i.e., Sherman Nicholas, John Lambert, Mike Maple, Danny Adams, and Majorie Mounts. In addition, because the Respondent is engaged in the construction industry, in accord with *Dean General Contractors*, 285 NLRB 573 (1987), I will leave to the compliance stage of this proceeding the determination of whether the discriminatees to be offered employment would have continued in the Respondent's employment after completion of the projects for which they would have been hired.

Even though Respondent has been found guilty of violating the Act on another occasion in *Stark Electric*, 324 NLRB 1207 (1997), I will not recommend a broad cease-and-desist order because the unfair labor practices in the instant case predate the unfair labor practices found to have been committed by Respondent by Administrative Law Judge Arthur J. Amchan and the Board in 324 NLRB 1207.

#### CONCLUSIONS OF LAW

1. The Respondent, Stark Electric, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Charging Party, International Brotherhood of Electrical Workers, Local 317, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent on and after March 28, 1996, violated Section 8(a)(1) and (3) of the Act when it failed and refused to hire Sherman Nicholas, John Lambert, Mike Maple, Danny Adams, and Majorie Mounts because of their union affiliation.

4. The unfair labor practices found above are unfair labor practices having an effect on commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>1</sup>

#### ORDER

The Respondent, Stark Electric, Inc., Huntington, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to hire applicants for employment because they are members of a union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

<sup>1</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order offer the five discriminatees consistent with the remedy section of this decision the jobs for which they were denied employment or, if those jobs no longer exist, to substantially equivalent positions at new jobsites, if necessary, and make them whole for any loss of earnings and other benefits suffered by them as a result of the discrimination against them. Backpay to be computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region post at its facility in Huntington, West Virginia, and all other places where notices customarily are posted, copies of the attached notice marked "Appendix."<sup>2</sup> Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 28, 1996.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

#### APPENDIX

##### NOTICE TO EMPLOYEES

##### POSTED BY ORDER OF THE

##### NATIONAL LABOR RELATIONS BOARD

##### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

<sup>2</sup> If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT fail and refuse to hire applicants for employment because they are members of a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer employment to Sherman Nicholas, John Lambert, Mike

Maple, Danny Adams, and Majorie Mounts, to the jobs for which they were denied employment or, if those jobs no longer exist to substantially equivalent positions and WE WILL make them whole for any loss of earnings and other benefits resulting from our discrimination, less any net interim earnings, plus interest.

STARK ELECTRIC, INC.